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No. 82-1778

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARILYN JOYCE SELLFORS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

LEONARD SCHAITMAN
JOHN C. HOYLE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), bars petitioner's suit challenging the Federal Aviation Administration's decision to obtain compliance with safety assurances from a county airport operator under the Airport and Airway Development Act of 1970, 49 U.S.C. (& Supp. V) 1701 *et seq.*, through negotiations rather than more coercive means.

2. Whether the FAA's failure to obtain compliance with safety assurances was inconsistent with any state law duty that would subject the United States to liability as a private person, as required by the Federal Tort Claims Act, 28 U.S.C. 2674.

3. Whether air traffic controllers were negligent in failing to warn petitioner's husband of the presence of birds on or near the runway prior to his take-off.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 697 F.2d 1362. The opinion of the district court (Pet. App. A25-A34) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1983. A petition for rehearing was denied on March 23, 1983 (Pet. App. A15). The petition for a writ of certiorari was filed on May 2, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner's husband was killed on February 26, 1973, when the Lear jet he was piloting crashed shortly after take-off from the DeKalb-Peachtree Airport in Chamblee, Georgia (Pet. App. A4). The airport is owned and operated by DeKalb County, Georgia.

The County received federal funds under the Airport and Airway Development Act of 1970, 49 U.S.C. (& Supp. V) 1701 *et seq.* (hereinafter "AADA") (Pet. App. A21). As a statutory prerequisite to receiving the funds, 49 U.S.C. 1718(a)(3), the County entered into several contracts, or grant agreements, with the Federal Aviation Administration ("FAA"), assuring the agency that any existing safety hazard at the airport would be eliminated and promising to prevent future hazards (Pet. App. A30-A31).

The County also owned land adjacent to the airport and used it as a dumpsite for garbage. The refuse at the landfill attracted birds, which created a potential safety hazard for the airport (Pet. App. A5). The crash involved in this case resulted from a sudden loss of power when the aircraft's engines ingested birds at an altitude of between 100 and 200 feet shortly after take-off (*id.* at A21).

The birds first appeared at the airport in 1969 (Pet. App. A5). Local FAA employees apparently were informed of the hazard in 1972 (*ibid.*). After conducting an investigation, the agency negotiated with the County and requested the County to eliminate the problem, if necessary, by discontinuing use of the landfill (*ibid.*). At various times during the negotiations, the County promised to close the landfill (R. Vol. 13, 809; Def. Exh. 4). But despite the FAA's "friendly coercion" (Pet. App. A5), the landfill was kept open and the birds remained in the vicinity of the airport.

On the morning of the crash, birds were observed near one of the runways—not the one used by petitioner's decedent—but the airport manager frightened them off by shooting some of them (Pet. App. A6). He also inspected the runway that was used by the deceased pilot and found no birds in that area (*ibid.*). The air traffic controllers also saw no birds in the area of the runway used by the deceased (*ibid.*), nor were there any reports of bird sightings from

pilots using that runway (*ibid.*).[1] Consequently, the controllers did not warn petitioner's husband of any birds in the area of his runway prior to take-off.[2]

2. Petitioner brought suit against the United States under the Federal Tort Claims Act, 28 U.S.C. (& Supp. V) 2671 *et seq.* ("FTCA"), alleging that the FAA's employees were negligent in not forcing the dumpsite to be closed and in failing to warn the deceased that birds might be present near the runway. The district court entered judgment for the United States, stating from the bench that "there was no evidence of negligence of air traffic controllers in failing to warn of any birds for there is no evidence that they sighted any birds whatsoever near [the runway] at any time on that morning, or certainly at any time approximating the time of takeoff of the Learjet."

In a subsequent written opinion, the district court rejected petitioner's claims that the FAA breached a duty to abate the potential hazard caused by the birds' presence in the vicinity of the airport (Pet. App. A28-A34). The court held that even assuming that Section 18 of the AADA, 49 U.S.C. 1718, imposes a duty on the FAA to obtain specific safety assurances from an airport receiving federal funds, the United States cannot be held liable under the FTCA on a negligence per se theory (Pet. App. A29-A30). Rather, the court held (*id.* at A30-A31):

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[1]The pilot who preceded petitioner's husband testified that he saw a small flock of birds in the grass alongside the runway but did not report this to the tower (Pet. App. A6). Another aircraft landed before petitioner's husband took off, but the pilot of that plane did not report seeing any birds (*ibid.*).

[2]The deceased had actual knowledge of the bird problem. The map in his plane expressly referred to the hazard and the deceased used the airport frequently (Pet. App. A5).

> [U]nder the FTCA the government has waived its sovereign immunity only as to those torts recognized under state law. * * * [T]his cause of action is not one that would be asserted against a private person under Georgia law and therefore cannot be maintained under the FTCA.

The district court also held (Pet. App. A33) that the discretionary function exception to the FTCA, 28 U.S.C. 2680(a), bars liability based on the FAA's failure to abate the safety hazard caused by the dumpsite. The court concluded (Pet. App. A33) that "the authority to impose additional conditions upon air traffic or to further restrict the use of the airport is a function committed to the sound discretion of the FAA and therefore under section 2680(a) cannot be the basis for liability under the FTCA."

3. The court of appeals affirmed (Pet. App. A1-A14). After conducting "[a] thorough review of the evidence," the court of appeals upheld the district court's finding that the air traffic controllers were not negligent in failing to warn the deceased pilot of the presence of birds (*id.* at A6). Instead, the court found (*ibid.*) that "substantial evidence * * * provides clear support that the air traffic controllers were not negligent in failing to warn Mr. Sellfors of the hazard."

The court of appeals also held (Pet. App. A11) that "the AADA does not give rise to a statutory duty on the part of the United States owed to private persons using federally funded airports," and, in any event, the FTCA was not intended to redress breaches of federal statutory duties (*id.* at A8). With regard to petitioner's state law claim, the court ruled that petitioner had failed to prove all of the elements of the good samaritan doctrine necessary to establish a cause of action under Georgia law (*id.* at A13):

> [T]he FAA did not cause to exist the dangerous condition nor did such act in any manner increase the risk of harm to persons using the airport. Furthermore, there is no evidence that the pilot Sellfors relied upon these grant agreements to insure airport safety. In fact, the record does not reflect that Mr. Sellfors even had knowledge of the existence of the grant agreements.

Finally, the court of appeals concluded that the discretionary function exception barred petitioner's action because "[a]ssuming, *arguendo*, that the FAA possessed the power to enforce compliance with its grant agreements, the Secretary was acting as a governmental policy-maker in his decision to apply negotiation and diplomacy rather than legal measures" (Pet. App. A14).

ARGUMENT

1. Petitioner's principal argument (Pet. 6-16) is that the FAA should have taken more coercive action to force the County to close the landfill and eliminate the safety hazard presented by the birds in the vicinity of the airport. The court of appeals correctly held, however, that the discretionary function exception to the FTCA, 28 U.S.C. 2680(a), bars petitioner's suit against the United States based on this theory.

Petitioner does not dispute that the FAA attempted through negotiations to induce the County to eliminate the safety hazard. Rather, petitioner argues that the FAA should have used other means to obtain compliance with the safety assurances given in the grant agreements. But, even assuming, as the court of appeals did (Pet. App. A14), that the FAA had authority to enforce the safety agreement, the decision "to apply negotiation and diplomacy rather than legal measures" (*ibid.*) was one that the Secretary was entitled to make as the governmental policy-maker in this

area.[3] That decision was plainly a policy decision, not an operational function, and accordingly, cannot give rise to liability under Section 2680(a). See *Dalehite* v. *United States*, 346 U.S. 15, 26 (1953).

The holding below is fully consistent with the decisions of other courts of appeals that the discretionary function exception immunizes from tort suits agency determinations regarding what action to take to enforce statutes they administer. See, *e.g.*, *Bernitsky* v. *United States*, 620 F.2d 948, 955 (3d Cir.), cert. denied, 449 U.S. 870 (1980); *First National Bank in Albuquerque* v. *United States*, 552 F.2d 370, 375-376 (10th Cir.), cert. denied, 434 U.S. 835 (1977); *Miller* v. *United States*, 378 F. Supp. 1147 (E.D. Ky. 1974), aff'd, 522 F.2d 386 (6th Cir. 1975); *Smith* v. *United States*, 375 F.2d 243 (5th Cir. 1967). Petitioner argues (Pet. 14-15) that the decision conflicts with the Fifth Circuit's reasoning in *Payton* v. *United States*, 679 F.2d 475 (1982) (en banc). In *Payton*, however, the court held that the discretionary function exception protects policy decisions, such as the decision whether to release a prisoner on parole, but does not protect ministerial duties such as failing to supply another agency with certain records. Nothing in the AADA

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[3]The language of the statute itself clearly grants the Secretary broad discretion to determine what means are appropriate to achieve compliance with the objectives of the AADA. The last paragraph of 49 U.S.C. 1718 (emphasis added), provides:

> To insure compliance with this section, the Secretary shall prescribe such project sponsorship requirements, consistent with the terms of this subchapter, *as he considers necessary. Among other steps to insure such compliance* the Secretary is authorized to enter into contracts with public agencies, on behalf of the United States. * * *

imposes a duty on the FAA at all comparable to the mandatory requirement imposed on the Bureau of Prisons that was involved in *Payton*.[4]

2. Petitioner argues (Pet. 7-14) that the court of appeals erred in holding that the FAA had not breached a duty owed to petitioner's decedent. The precise nature of petitioner's submission is somewhat unclear; it appears that petitioner contends both that the court erred in not imposing liability based directly on the alleged breach of the statutory obligations in the AADA and that the court erred in failing to find liability based on the good samaritan doctrine recognized in Georgia law. At the outset, we point out that neither contention survives the court of appeals' holding that the FAA's decision was a "discretionary function." In any event, the court of appeals correctly decided that the FAA owed no legally cognizable duty to petitioner's decedent.

Petitioner's first claim, which is derived directly from the AADA, plainly is not actionable under the Tort Claims Act. The courts of appeals are in agreement that the FTCA is inapplicable to a claim based solely on an alleged violation of a federal statute. See *Zabala Clemente* v. *United States*, 567 F.2d 1140, 1149 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978); *Baker* v. *F & F Investment Co.*, 489 F.2d 829, 835 (7th Cir. 1973); *Devlin Lumber & Supply Corp.* v. *United States*, 488 F.2d 88, 89 (4th Cir. 1973); *Davis* v. *United States*, 395 F. Supp. 793, 795 (D. Neb. 1975), aff'd,

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[4]Similarly, *Aretz* v. *United States*, 660 F.2d 531 (5th Cir. 1981), upheld a decision that the discretionary function exception does not extend to the failure to comply with standard operating procedures in the handling of dangerous materials. No standards govern the FAA's decision here.

536 F.2d 758 (8th Cir. 1976).[5] To be actionable the claim must be based on a state law duty. See 28 U.S.C. 2674.[6]

Nor did the FAA's failure to abate the landfill satisfy the Georgia good samaritan doctrine. See Sections 323 and 324A of the Restatement (Second) of Torts (1965). As the courts below found (Pet. App. A13, A31), the FAA never undertook to provide any service regarding airport safety upon which petitioner's decedent could have relied. In addition, there was no evidence that petitioner's decedent was even aware of the FAA's responsibilities under the AADA.[7]

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[5]Nor could petitioner recover directly under the AADA. That statute does not expressly confer a private right of action, and petitioner does not contend that one may be implied from the Act. See *Miree* v. *DeKalb County*, 433 U.S. 25, 33 (1977).

[6]In rejecting application of the negligence per se doctrine, the court of appeals discussed state tort law regarding municipalities. Petitioner complains (Pet. 12-13) that this discussion is inconsistent with the statutory requirement that the United States' liability be determined "as if it were a private person." 28 U.S.C. 2674; *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955). We agree that the discussion is not proper in determining liability under the FTCA, but it does not seem to have played any role in the court's decision. The court, instead, relied upon the decisions cited above that hold that recovery cannot be based on mere breach of a federal statutory duty. See Pet. App. A8.

[7]The holding of the court of appeals that specific reliance is required to satisfy the good samaritan doctrine may conflict in theory with decisions in the Ninth Circuit that general reliance by an injured party on an administrative program is sufficient to warrant recovery. *United Scottish Ins. Co.* v. *United States*, 692 F.2d 1209 (1982), cert. granted, No. 82-1350 (May 16, 1983); *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)* v. *United States*, 692 F.2d 1205 (1982), cert. granted, No. 82-1349 (May 16, 1983). Initially, we submit that the Ninth Circuit's decisions are incorrect, but even if a presumption of reliance is reasonable in the case of the FAA's airworthiness certification program, it is unlikely that the Ninth Circuit would extend its rule to a program such as the AADA. See *Zabala Clemente* v. *United States*, 567 F.2d 1140 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978). In any event, it is not necessary to hold this petition pending the outcome of *United Scottish* and *Varig* since the judgment below is completely

3. Finally, petitioner asks (Pet. 16-20) this Court to review the determination of both courts below that the air traffic controllers were not negligent in failing to warn the deceased pilot of the presence of birds. Further review of this factual determination is clearly unwarranted. Petitioner attempts, however, to convert this dispute into a legal one by asserting that the courts below relied solely on the fact that the controllers did not see the birds and that Georgia law instead required the court to determine if the controllers should have ascertained if there were birds in the area. This argument mischaracterizes the lower courts' findings.

The courts held that the controllers had no reasonable basis for believing that there was any problem on the runway used by petitioner's husband (Pet. App. A6). Not only had the controllers not seen any birds in that area, they had received no reports of bird sightings from the numerous pilots using that runway. Accordingly, the determination that the controllers were not negligent was based on a proper standard of reasonableness.

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sustainable on the discretionary function issue, and petitioner does not contend that the discretionary function analysis in those cases conflicts with the holding in this case (see Pet. 14-16).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

LEONARD SCHAITMAN
JOHN C. HOYLE
Attorneys

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